Supreme Court of the United States

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

No.

OSWALD RENDON,

Petitioner,

against

JEAN GOLDNER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and the Associate Justices of The Supreme Court of The United States:

Petitioner, Oswald Rendon prays for a writ of certiorari to be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action pursuant to its decision dated December 1, 1960.

Opinion Below

The opinion of the Court of Appeals (Swan, Clark and Medina, Circuit Judges), which affirmed the District Court for the Southern District of New York (Dimock, J.) is reported in 283 Fed. 2d 881. A copy of the opinion is contained in the Appendix at pages 12-14. There was no opinion by the District Court Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on the 1st day of December, 1960. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this court is invoked under 28 U. S. C. A., Section 1254 (1).

Questions Presented

The question presented involves the propriety of a procedure in a jury trial which, it is submitted, is erosive of the traditional concept of what constitutes a fair jury trial and transcends the frame of reference here involved—a personal injury action. Specifically, the questions are whether

(1) the right to have a jury decide issues solely on the evidence and the law, free of any extraneous influences, is violated by the trial court's sending the reporter into the jury room to read the judge's charge in the absence of court and counsel.

(2) Whether objection to such procedure, duly made known to the trial court pursuant to Rule 46 of the Federal Rules of Civil Procedure, is waived by a failure to insist on it after an adverse ruling by the trial judge.

Statutes Involved

The statute involved is Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. A.

Statement of Case

The plaintiff, Oswald Rendon, was a passenger in defendant's automobile. While proceeding along a country road in Blauvelt, N. Y., the car failed to make a left-hand curve, ran off the road and overturned, causing the plaintiff to sustain serious injuries. There was a jury trial before Judge Dimock in the United States District Court for the Southern District of New York.

After the jury had deliberated for some time, the jury sent a message that they desired to have the judge's charge read to them (105a). Defendant's counsel suggested that the reporter go into the jury room and read the charge to the jury (105a). Initially, plaintiff's counsel did not voice objection to the procedure.

Before the reporter went in, plaintiff's counsel reflected and had a change of mind. He told the court that such a procedure might lead to colloquy between the reporter and the jury, or between the jurors themselves, without the presence of counsel, and suggested that the reading of the charge should be done in the court room (106a). The court stated, however, that the reporter could be trusted to do nothing except to read the charge as it was (106a). The reporter was thereupon directed to go into the jury room and read the charge (106a-107a). The objection to the procedure was not repeated.

The jury rendered a verdict in favor of the defendant, a verdict which the trial court refused to set aside, although it stated that the jury's verdict would not have been his (119a), that he would have found the other way

(120a), that he thought the verdict was unusual and surprising (120a). No doubt the court voiced this sentiment because of the totally incredible nature of defendant's testimony.

The Version of July 22, 1957, the Night of the Accident

After the accident, when plaintiff was being taken to the hospital by ambulance, defendant accompanied him (12a). On the way there, she said: "Gee, I'm sorry Ozzie, I couldn't make the curve" (12a). The police officer, Lenahan, who had come to the scene pursuant to a radio call (24a), testified that defendant told him that she was going for a ride and ran off the road (38a). She did not say a word about skidding (38a). He testified he did not see any oil (25a, 27a) or skid marks (25a), and that the road had not been oiled (34a).

The July 30, 1957 Version—The Report to the Motor Vehicle Bureau

On July 30, 1957 the Motor Vehicle Bureau, at Albany, received a report from the defendant describing the accident (68a, 69a). In this report it was stated that a left curve "loomed up" ahead of her (69a). No mention was made in this report of oil as a contributing cause for the accident (69a). Although she claimed that the report was written by her father she admitted that she had told him what to write, had read what he had written and had subscribed to it (69a).

The January 28, 1958 Version—The Hearing in the Motor Vehicle Bureau

It was here that the explanation of skidding on an oily surface first appeared (20a). On this occasion she described the accident as follows:

"I was approaching and I hit the curve and applied my brakes, and as I applied my brakes the rear wheels began to skid. The road had just been re-surfaced with gravel and oil, as they do in the country. The car started to skid and it flipped" (19a-20a).

The Trial Version

At the trial she reasserted her explanation of skidding on an oily surface (58a, 64a). She also tried to avoid the implications of a lack of watchfulness and alertness implicit in her statement to the Motor Vehicle Bureau that the curve "loomed up", and in her testimony at the Motor Vehicle hearing that she "hit the curve" and then applied her brakes. She first repudiated the statement (67a), and then claimed that the expression "hit the curve" meant "approaching" (71a). She said that her prior expressions were a matter of "semantics" (69a, 71a).

What at one phase of her testimony was described as an instantaneous accident (58a), was now divided by her into a series of distinct episodes. First she saw the curve 300 feet ahead (65a). Then she made a decision to apply her brakes (65a). Then she translated her decision into action when she was fifty feet away from the curve (66a). Then she skidded on the oily surface (63a, 64a).

There can be no doubt that this claim of skidding on an oily surface was an afterthought. Apart from the fact that defendant's earlier statements contained not even the suggestion of an oily surface as a cause for the accident, there is the disinterested testimony of police officer Lenahan that he saw no oil on the road (25a, 27a), that he saw no skidmarks (25a), and that in point of fact the authorities in charge of the highway never used oil in maintaining the road (34a). Defendant conceded that when the accident occurred she knew nothing of oil (67a).

Contributory Negligence

Over objection by plaintiff's counsel (103a), contributory negligence was submitted as an issue. There was no

factual basis for such submission. There was no contention that anything plaintiff physically did contributed in any way to the occurrence of the accident which brought about his injuries. Concededly, all he was doing was to sit next to the driver and converse with her (65a).

The issue of contributory negligence that the court submitted to the jury was whether plaintiff failed to protest against any negligence in the manner of defendant's driving (95a-96a). At most, the distance travelled by the car from the point where defendant last stopped it and the point where the accident occurred was a half a mile. Defendant said it was 500 to 650 feet (19a, 70a). There is no proof whatever of anything that defendant did in those seconds of travel that plaintiff should have protested against.

Certainly it could not be a continuing speed violation. Defendant denied driving in excess of any speed limits (66a), and plaintiff was precluded from proving what the speed limit was (25a).

There was nothing ahead of plaintiff's vehicle to cause plaintiff to anticipate the possibility of an accident so as to invoke the need for a caution or protest.

It was suggested that plaintiff should have protested against driving with low-beam lights. Defendant denied being impeded or hindered in any way in her ability to see. She said the night was clear, visibility was good, that she could see 300 feet or more ahead of her (22a, 57a, 58a, 65a, 70a, 72a).

The duty to protest would arise only if plaintiff knew defendant was driving dangerously or under conditions that incapacitated her from seeing what she should see. Since plaintiff had no knowledge or any such incapacity, and defendant disclaimed it, there was no basis for a finding of contributory negligence for failure to protest.

It is clear from the foregoing that the surprising and unusual verdict was not based on the evidence, that it must have been engendered by something happening in the jury room which should not have been permitted.

Reasons For Granting the Writ

(1) It has been said:

"The jury system is founded upon the proposition that disinterested jurors will hear the evidence in open court, and upon that evidence and that evidence alone, deliberate amongst themselves until a verdict is reached (cases cited). To permit various persons, under one pretext or another, to be with the jury in its deliberations, is to open the door to grave abuse and to strike directly at the heart of the system. Without exception, as far as we are advised, such procedure has been held to be error (cases cited)."

Little v. *United States*, 73 F. 2d 861 (10th Cir.) at p. 864.

Accordingly it has been pointed out that the presence of a reporter in a jury room to read instructions or testimony in the absence of court and counsel may lead to irreparable damage to a litigant.

"No harm may come from it, it is true; but on the other hand, a mistake in the reading of a shorthand symbol which * * * counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or phrase, and any other events which might readily occur; would result in irremediable prejudice * * * Underneath that phase of it lies the proposition that no one should be with the jury while it is engaged in its deliberations."

Little v. *United States*, 73 F. 2d 861 (10th Cir.), at p. 864.

In another case it has been said (*Otto* v. *Young*, 43 Misc. 628, 88 N. Y. S. 188):

> "Permitting a stenographer to enter the jury room, without the presence of the counsel, is in law the same as though any stranger were allowed to tell the jury his recollection of certain testimony given upon the trial. No one may be permitted to communicate with the jury during its deliberation—a rule equally applicable to the custodian of the jury, except that by order of the court he may ask if the jurors had agreed. Am. & Eng. Ency. of Law (2d Ed.) vol. 17, p. 1203. 'It has always been the policy of the law to watch over the deliberations of the jury with great care, and scrupulously to guard them against any extraneous influences.'
>
> Mischief may result in acquiescing in a practice which will permit a stenographer privately to read his minutes to the jury. The stenographer may not be absolutely accurate in essential points or may have omitted some of the testimony, or he may give intonations or read his notes in such a way as not to fairly represent the testimony of the witness." (Citing cases from many jurisdictions.)

The error, therefore, was clearly a fundamental one, in gross violation of traditional and most important rules governing jury trials.

(2) When plaintiff's counsel brought to the court's attention that there might be colloquy between the reporter and the jury at which counsel would not be present (106a), he clearly made known his objection to the procedure. When it was suggested by him that the reading of the charge should be done in court, in the presence of the judge and the attorneys, he clearly indicated what action he thought should be taken. This constituted a compliance

with Rule 46 which provides that a point is preserved when a party makes known to the court the action which he desires to take or his objection to the action of the court and his grounds therefor.

There is no formula or ritual that is necessary in order to preserve a point.

> "The rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them."
>
> Moore's Federal Practice, Vol. 5, pp. 2504-2505, and cases cited therein.

Accordingly, the error was adequately pointed out to the judge, and the point clearly preserved.

The Court of Appeals thought that because plaintiff's counsel ultimately acquiesced in the procedure there was no error. This statement of the Court of Appeals, we submit, does not take into account the relation between court and counsel. For plaintiff's counsel to have persisted in his objection after an adverse ruling would have been contrary to orderly court procedure.

> "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable that in order to protect himself against an imputed surrender a party must reassert what has been overruled every time the occasion comes up again."
>
> *Keen* v. *Overseas Tank Ship Corp.*, 194 F. 2d 515 (2d Cir.), cert. den. 343 U. S. 966.

The Court of Appeals felt that the court's cautioning the reporter not to talk to the jurors cured the error. The trouble with that is that we do not know what happened, and may therefore not speculate that harm was not done. The presumption is that harm was done by the improper procedure.

> "In this case we know nothing of what went on while the stenographer was in the jury room; it is entirely possible that a shorthand character was misinterpreted; emphasis plays an important role in transmission of ideas by word of mouth, *and the difficult injunction of the court to avoid any emphasis is no assurance that there was none.* What else may have occurred, we do not know. No outsider has any business in the jury room; much harm could result, and that is enough. The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand." (Emphasis supplied.)
>
> *Little* v. *United States*, 73 F. 2d 861, at p. 867.

Conclusion

Petitioner respectfully submits that there are important questions relating to procedures to be followed in jury trials that should be resolved by this court. Accordingly the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

BENJAMIN H. SIFF,
Counsel for the Petitioner.
84 William Street,
New York 38, New York.

APPENDIX

Statutes Involved

Rule 46 of the Federal Rules of Civil Procedure, which provides:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Per Curiam Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 69—October Term, 1960.

(Argued November 2, 1960 Decided December 1, 1960.)

Docket No. 26172

OSWALD RENDON,

Plaintiff-Appellant.

—v.—

JEAN GOLDNER,

Defendant-Appellee.

Before:

SWAN, CLARK and MEDINA, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York in a personal injury action tried before Judge Dimock and a jury whose verdict was for the defendant. Affirmed.

LANDES & WINGATE, *Attorneys for Plaintiff-Appellant.*
Benjamin H. Siff, of Counsel.

REILLY & REILLY, *Attorneys for Defendant-Appellee.*
John G. Reilly and Harold V. McCoy, of Counsel.

Per Curiam Opinion of the United States Court of Appeals

PER CURIAM:

Plaintiff and defendant were counsellors at a summer camp for children. On the evening of July 27, 1957 they took a drive in defendant's open sports car. She drove and he was a passenger sitting at her right. While proceeding on Bradley Parkway, an unlighted two-lane macadam road, in Blauvelt, N. Y., the car failed to make a left-hand curve, ran off the road, and overturned, causing injuries to the plaintiff. At the trial Judge Dimock submitted to the jury the issues of defendant's negligence and plaintiff's contributory negligence. The jury returned a verdict in favor of the defendant. As federal jurisdiction rests on diversity, New York law controls.

The appellant's principal contention is that there was no evidence of contributory negligence and therefore it was reversible error to submit that issue to the jury. Plaintiff claimed that the accident occurred because of the negligence of the defendant in driving too fast, in failing to apply her brakes in time, and in failing to use high beam lights on the unlighted road. She admitted her speed was 30 to 35 miles, that she was only 50 feet from the curve when she applied the brakes, and that her low beam lights were on from the time she entered Bradley Parkway to the place of the accident. This distance she said was between 500 and 650 feet. But plaintiff's witness, policeman Lenahan, testified that the distance was half a mile. Besides contending that there was oil on the road (denied by the policeman) which caused her car to skid, she argued that if she was negligent the plaintiff was contributorily negligent in failing to protest against the negligent manner of her driving. The judge called the jury's attention to this claim and charged: "Failure to protest where there was an opportunity to do so may be considered by you as evidence of contributory negligence." Plaintiff said that

when the car entered Bradley Parkway it was so dark that he "couldn't see too far." This, according to the policeman, was half a mile from the accident. Under New York law a plaintiff has the burden of proving that he was not contributorily negligent. *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112. This court cannot rule, as a matter of law, that the appellant sustained that burden. Whether plaintiff's failure to protest constituted contributory negligence was, in our opinion, a jury question. As the court stated in *Nelson* v. *Nygren*, 259 N. Y. 71, 75, 181 N. E. 52: "The question of contributory negligence ordinarily is a question of fact."

Appellant contends also that it was error to permit the reporter to enter the jury room and read the court's charge, which they asked to have repeated. Plaintiff's attorney at first stated he had no objection to this procedure; but later he suggested that the jury should be cautioned not to converse with the reporter and said: "I think that is the only danger involved." The court did caution them, and the attorney made no further objection. Under the circumstances disclosed by the record we see no error in the procedure.

Judgment affirmed.